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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 210

PHILIP A. FOLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Vol. 8, 1) [1] is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 12, 1961 (Vol. 8, 15). A motion for rehearing

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[1] Volume references are to Volumes 1 and 8 of the eight unprinted volumes making up the record. Volume 1 contains original papers and pre-trial proceedings and Volume 8 contains proceedings in the United States Court of Appeals for the Eighth Circuit. Volumes 2 to 7, inclusive, contain the transcript of the trial proceedings paginated from 1 to 1322. Record references (R. ——) will be to said transcript.

was denied by order filed June 7, 1961 (Vol. 8, 16). The petition for a writ of certiorari was filed on July 6, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court, in a prosecution for the felony of wilfully attempting to evade or defeat the payment of income tax, erred in not instructing the jury that the petitioner could be convicted of the misdemeanor of wilfully failing to pay a tax, or keep records, or supply information (Internal Revenue Code of 1939, Section 145(a)).

2. Whether the trial court erred in instructing the jury that they could consider petitioner's interest in the outcome of the case in assaying his credibility.

3. Whether the trial court erred in not granting petitioner's pre-trial motion to dismiss the indictment.

CONSTITUTIONAL AMENDMENT, STATUTES AND RULES INVOLVED

The Constitution of the United States:

Amendment 6.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in

his favor, and to have the Assistance of Counsel for his defense.

Internal Revenue Code of 1939 (26 U.S.C., 1952 ed.):

SEC. 145. PENALTIES.

(a) *Failure to file returns, submit information, or pay tax.* Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations made under authority thereof to make a return or declaration, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any estimated tax or tax imposed by this chapter, who willfully fails to pay such estimated tax or tax, make such return or declaration, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

(b) *Failure to collect and pay over tax, or attempt to defeat or evade tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than

$10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

18 U.S.C.:

SEC. 3481. COMPETENCY OF ACCUSED.

In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him.

Federal Rules of Criminal Procedure:

Rule 31. VERDICT.

* * * * *

(c) *Conviction of Less Offense.* The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

* * * * *

Rule 48. DISMISSAL.

(b) *By Court.*—If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.

STATEMENT

On February 5, 1959, petitioner was indicted in the United States District Court for the Eastern District of Missouri on charges that he wilfully attempted to evade and defeat the joint income taxes owing for himself and his wife for the years 1952 and 1953 by filing false and fraudulent joint income tax returns which understated the taxes due and owing the United States, in violation of Section 145(b) of the Internal Revenue Code of 1939 (R. 1301-1303). The amounts of income and the taxes due thereon, as reported in the returns and as corrected, were alleged to be as follows:

	Reported		Corrected	
	Net Income	Tax	Net Income	Tax
Count I (1952)	$4,053 27	$500 32	$ 8,684 78	$1,597 66
Count II (1953)	$4,231 34	$672 96	$11,805 60	$2 627 62

Petitioner, in a pre-trial motion, sought dismissal of the indictment upon the ground that the Government unreasonably delayed presenting the matter to a Grand Jury and, thus, violated his right to a speedy trial in violation of the Sixth Amendment of the Constitution (Vol. 1, 9-10). After a hearing the motion

was denied (Vol. 1, 12, 19-37). Following a jury trial which lasted nine days, petitioner was found guilty upon both counts (Vol. 1, 44, 64-65). He was sentenced to a prison term of three years and fined $2500 on each count, the prison terms to run concurrently (Vol. 1, 49).

The Government's case was established by the testimony of some 130 witnesses, the stipulated testimony of more than 50 others, and by more than 350 exhibits. Most of the testimony, stipulations, and exhibits were directed to proving legal fees paid petitioners during 1952 and 1953. (R. 187-206, 255-261, 269-300, 304-344, 380-401, 404-501, 578-593, 944-948, 950-961, 968-1009). At the close of the Government's case, there had been evidence adduced that in 1952 petitioner, a lawyer, had net income of $8,036.04 upon which he should have paid a tax of $1,438.06, and that in 1953 he had net income of $9,700.89 upon which the tax was $2,017.26 (R. 1053-1058).

In computing gross income petitioner used the total of deposits for the year shown in his bank book. From that total there were eliminated items described by petitioner as non-income, and there was added petitioner's estimate of cash not deposited in the bank.[2] (R. 41-42, 45, 76, 101.) Business expenses evidenced by cancelled checks or found to have been paid by cash were reflected in the return (R. 43-44).

The allowance for undeposited cash receipts was inadequate in each of the years in question, and peti-

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[2] Essentially the same approach had been used for many years by petitioner in preparing his tax returns (R. 1075-1076, 1156-1157).

tioner's bank book or passbook, used as a basis for determining gross income, did not even record all deposits to petitioner's account. In particular, petitioner had received cash payments from one Roy Graham which had not been accounted for either in bank deposits or in estimates of undeposited cash. (R. 80, 85-88, 104-105).

Roy Graham was a tavern keeper and bail bondsman who testified that he had paid some $2800 to petitioner in 1952, and some $3800 in 1953 (R. 501, 507, 508-513, 518-523, 525-529, 531-533). Graham would give cash to petitioner from time to time and periodically would make out a check to petitioner's order in an amount equalling the total of a number of such advances. Petitioner would then endorse the check and return it to Graham who would deposit it in his own bank account as a way of recording the transaction (R. 524-525, 537-538). Graham regarded the payments as legal fees for services rendered by petitioner over a long period, for which Graham had paid petitioner nothing until he began to make money, in 1951 or 1952, from writing bonds (R. 507-508, 525-529, 531-532, 543-544).[3] Graham stated that there was no arrangement whereby he was to pay petitioner's income taxes on the money transmitted by him to petitioner (R. 543).

Testifying in his own behalf, petitioner did not contest the receipt of all the money concerning which the

[3] Petitioner claimed that Graham's payments to him represented the 50% split on Graham's net profits from the bail business due petitioner for the service of having prevailed on a local sheriff to permit Graham to sign appearance bonds. (R. 1099, 1103-1104, 1107).

Government's witnesses had testified, including the amounts received from Graham (R. 1095, 1124-1143, 1172-1175, 1179-1183, 1186-1187, 1189-1199). He claimed, however, that Graham had agreed to pay petitioner's income tax liability on the amount received. Petitioner testified that he kept no record of the money he received from Graham, did not report it as income, and did not learn until 1955 or 1956 that his income taxes on it had not been paid (R. 1119-1120, 1177-1178).

Petitioner ascribed understatement of other income to his careless method of keeping records, failing to keep written records of fees charged or received, failing to make carbon copies of receipts to clients for fees, making inadequate memoranda of cash not deposited and of clients' checks cashed by himself and his wife, and never bothering to total their checks drawn for personal expenses. (R. 1149, 1155-1158.)

The Court of Appeals for the Eighth Circuit unanimously affirmed the conviction (Vol. 8, 1).

ARGUMENT

1. Petitioner contends (Pet. 8-12) that he was entitled to have the trial court instruct the jury that he might be convicted of a lesser included offense under Section 145(a) of the 1939 Internal Revenue Code and states that he requested instructions "which would have authorized a conviction of the misdemeanor of wilful failure to supply correct information, wilful failure to keep records, wilful failure to pay the correct tax * * *." His contention is without merit. Conviction for such lesser included offense would have constituted error. In *Chaifetz v. United States*, 366 U.S. 209, this Court reversed, and remanded with directions to vacate, a con-

viction for the misdemeanor of wilfully failing to supply information required by law, which had been adjudged a lesser included offense of the felony of attempted evasion. That petitioner, too, had filed a tax return which was shown by the evidence to have been fraudulent. This Court in its *per curiam* opinion stated that its action was based upon a review of the entire record and the suggestion of the Solicitor General. The latter's brief had agreed that the conviction was erroneous in that the misdemeanor of wilfully failing to supply information required by law is not an offense necessarily included in the offense charged of wilful attempted evasion. See also, *Lee* v. *United States*, 238 F. 2d 341, 345-346 (C.A. 9), *Dillon* v. *United States*, 218 F. 2d 97, 101 (C.A. 8), certiorari granted, 349 U.S. 914, certiorari dismissed, 350 U.S. 906.

The theory of the necessarily included offense postulates a gradation in which proof of the greater offense requires proof of all of the elements necessary to establish the lesser, plus some other aggravating ingredient. 1 Wharton's *Criminal Law*, Sec. 33 (12th ed. 1932); *Ekberg* v. *United States*, 167 F. 2d 380, 385 (C.A. 1). See *Berra* v. *United States*, 351 U. S. 131, 134. The rule has its application, as Judge Magruder has pointed out, "where the legislature has defined two distinct offenses, but one offense requires proof of all the facts or elements necessary to establish the other, plus something more—in other words, a greater offense including a lesser." *Ekberg* v. *United States*, *supra*, 385. Here the evidence adduced to show that petitioner wilfully attempted to defeat and evade his tax by filing a false income tax return did not require proof that he failed

to file a return, keep records, supply information or pay a tax. *United States* v. *Kafes*, 214 F. 2d 887, 890-891 (C.A. 3) certiorari denied 348 U.S. 887, *United States* v. *Croessant*, 178 F. 2d 96, 97-98 (C.A. 3), certiorari denied 339 U.S. 927. See *Spies* v. *United States*, 317 U.S. 492, 499. On the contrary, the evidence showed that petitioner kept records, filed returns, supplied information, and paid taxes, albeit the records were inadequate, the returns fraudulent, the information false and the taxes understated. Thus, there was no evidence to justify instruction on any of the omissions to do these acts which are catalogued as misdemeanors in Section 145(a). *Davis* v. *United States*, 165 U.S. 373, 378-379; *Sparf and Hansen* v. *United States*, 156 U.S. 51, 63; *Burcham* v. *United States*, 163 F. 2d 761, 762 (C.A. D.C.).

2. Petitioner's contention (Pet. 12-14) that the Court improperly instructed the jury that it could consider his interest in the outcome of the case in determining his credibility as a witness, is without merit. The instruction merely puts a defendant who offers himself as a witness on a par with any other witness whose interest in the outcome of the case is properly to be considered by the jury in adjudging credibility. The propriety of such an instruction was carefully considered and approved in the leading case, *Reagan* v. *United States*, 157 U.S. 301, and, within the limits there delineated, the instruction's use has been approved in many other cases. *United States* v. *Marshall*, 266 F. 2d 92, 95 (C.A. 7th); *Schaefer* v. *United States*, 265 F. 2d 750, 754 (C.A. 8th), certiorari denied, 361 U.S. 844; *Stapleton* v. *United States*, 260 F. 2d 415, 420 (C.A.

9th); *Papadakis* v. *United States*, 208 F. 2d 945, 954 (C.A. 9th). And see *Hicks* v. *United States*, 150 U.S. 442, 452; *United States* v. *Paccione*, 224 F. 2d 801, 803 (C.A. 2d); *Fredrick* v. *United States*, 163 F. 2d 536 550 (C.A. 9th).

As the court below noted (Pet. 29), it would have been objectionable to have charged the jury that the defendant was to be disbelieved because he was the defendant, citing *Reagan* v. *United States*, *supra*, 310, but, as the appellate court found, the trial court's instructions were free of such error.

3. The trial court properly denied petitioner's pretrial motion which sought dismissal of the indictment for alleged undue delay in presenting the matter to the grand jury. Petitioner's motion to dismiss was correctly treated by the court below as within the purview of Rule 48(b)—a motion addressed to the sound discretion of the trial judge. *United States* v. *McWilliams*, 163 F. 2d 695 (C.A. D.C.); *United States* v. *Research Foundation*, 155 F. Supp. 650, 654, 656 (S.D. N.Y.) (Pet. 22-23). Referring to evidence taken upon the hearing of the motion and to facts developed during the trial, the court below concluded that it was well within the trial court's discretion to find that there was no unreasonable delay in bringing petitioner to trial. There is no reason for this Court to undertake a further review of the district court's exercise of its discretion.

The Revenue Agent on the case had commenced his work early in 1954 and prepared his report in 1955 (Vol. 1, 19-25). The special agent, brought in to determine whether criminal fraud existed, devoted most of his time in 1955 to the case and continued to work on

it, although at a somewhat decelerated pace, until he filed his report in May of 1957 (Vol. 1, 26-34). The nature of the evidence to be obtained fully justified the devotion of this amount of time to primary investigation.[4] The investigative report was reviewed by the special agent's supervisors; sent, in October of 1957, to the Assistant Regional Counsel; transmitted to the Department of Justice, in July of 1958; and thereafter forwarded to the local United States Attorney (Vol. 1, 33-37). The latter presented the matter to a grand jury on February 5, 1959, and the indictment was returned on that day (Vol. 1, 37).

Under these circumstances, petitioner's complaint is directed to a pre-indictment lapse of time which is shown neither to be unreasonable nor occasioned by intentional or vexatious delay on the part of the Government. Since mere lapse of time between offense and in-

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[4] The trial revealed that petitioner had refused to give the investigating agents access to his records except under compulsion of subpoena (R. 1159-1160). Therefore, petitioner's income was reconstructed from many other sources, as evidenced by over 170 witnesses (Pet. 5) who testified in person or by stipulation and by the numerous documents introduced into evidence. The lower court characterized this undertaking as "a commodious task" (Pet. 22).

Petitioner's stress upon the essential completion of the investigation by 1955, and his suggestion that the matter should have been presented to the Grand Jury in 1954 or 1955 (Pet. 15) are ill founded. It appears that most pertinent and material evidence of petitioner's attempted evasion was discovered subsequent to those years—the series of cash payments by Graham. Unreported, unrecorded and undeposited by petitioner, they seem not to have been uncovered until Graham's appearance before a Grand Jury, upon another matter, in 1956—a timing consonant with petitioner's testimony that he probably did not learn, until 1956, that these sums were being considered by Internal Revenue Service as taxable to him (R. 547, 1119).

dictment, absent some other combination of factors such as bad faith, harassment, or a complete lack of justification, has never been considered a sufficient ground for dismissal, the trial court did not abuse its discretion in denying petitioner's motion.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted

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OCTOBER, 1961.

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[5] Petitioner's contention that undue pre-indictment delay violated his constitutional right to a speedy trial ignores both the settled law that that right begins to vest only after the filing of a formal complaint or the return of an indictment (*Hoopengarner* v. *United States*, 270 F. 2d 465, 469 (C.A. 6th); *D'Aquino* v. *United States*, 192 F. 2d 338, 350 (C.A. 9), certiorari denied, 343 U.S. 935) and the evidence demonstrating that there was no unjustified delay.

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